1941

Aileen Webb v. Herbert A. Snow, Erastus P. Snow, Ann Pymm Snow, Evalyn S. Decker and Agnes S. Gallacher : Brief of Appellants

Utah Supreme Court

Judd, Ray, Quinney & Nebeker; Attorneys for Appellants;

In the Supreme Court of the State of Utah

AILEEN WEBB,

Respondent,

vs.

HERBERT A. SNOW, ERASTUS P. SNOW, ANN PYMM SNOW, EVALYN S. DECKER and AGNES S. GALLACHER,

Appellants.

No. 6381

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TEXTS

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STATEMENT OF FACTS

In this case the appellee sued appellants for damages suffered as a result of an alleged assault and battery taking place on the loading platform of the Giant Racer

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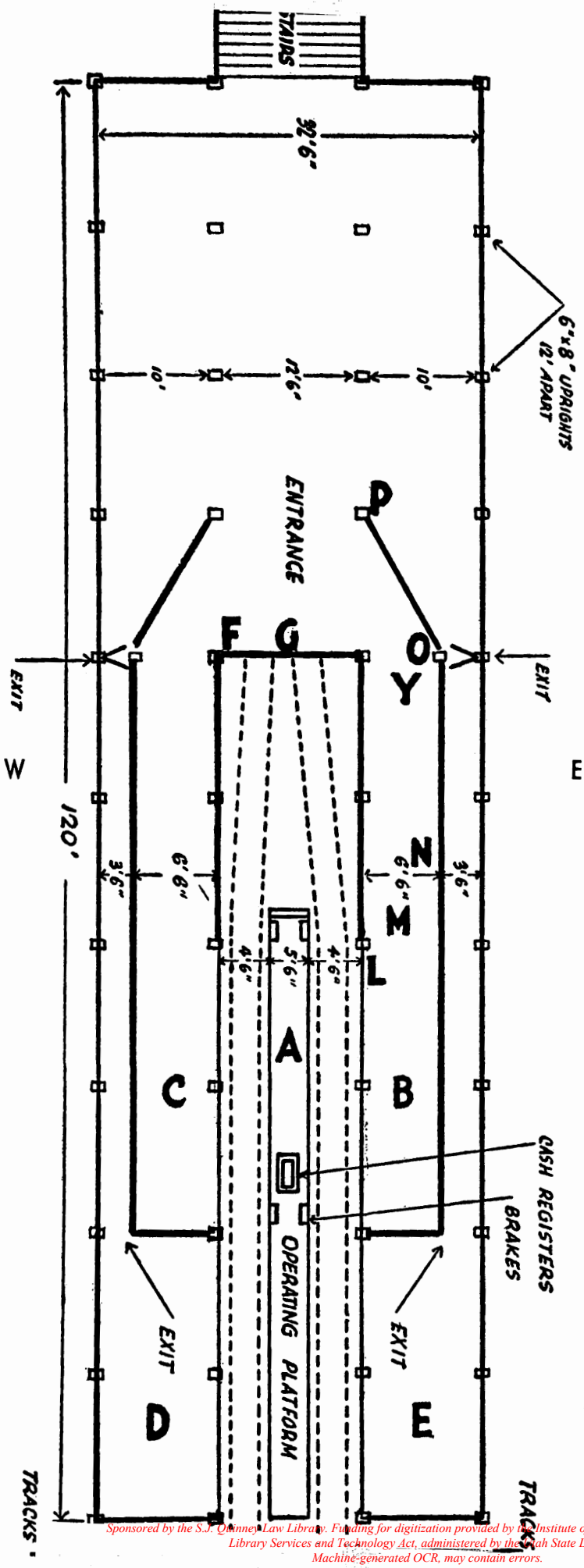
at Saltair Beach on the evening of June 22, 1940. This appeal is for the purpose of securing a reversal of a judgment in the trial court of Honorable P. C. Evans, wherein the appellee recovered a judgment against the appellants, based upon a verdict of the jury, for the sum of $5,022.50.

At the time of the alleged assault the appellants were the owners and operators of that certain amusement device known as the Giant Racer, which they operated under separate ownership from, but in connection with Saltair Beach. The payment of the admission to Saltair did not entitle one to ride the Racer—that called for an additional fee, which appellee, or any of her party, never paid or offered to pay. In order to facilitate the operations of said device there has been provided by the appellants and their predecessors in interest, a platform upon which the patrons coming to ride the racer approach the cars that run upon two sets of tracks that course the racer.

The approach to the racer loading platforms, together with the tracks upon which the cars operate, and the fences maintained as a part of said platform, are all set out in the following drawing which conforms to a blackboard drawing used for purposes of illustration at the time of the trial. This drawing has been approved by counsel for appellee, who agree that the same may be used as illustrative of the condition existing on the premises at the time complained of in this case.



Note: There is no gate, fence or other barrier between the entrance and either loading platform (B or C). Fares are not collected until passengers are in car seats.

Scale 1/16″=1′
Loading Platform of Giant Racer at Saltair.

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In operating the racer the appellants employed four men all of whom worked on the platform marked "A," which platform is from eighteen inches to two feet lower than Platform "C" the loading platform. Sam Whitehead managed the operation of the racer and
141 besides handled the brake lever at a point near the south end of Platform "A." With this brake Mr. Whitehead controlled the cars as they completed their trip around the racer and came into the loading station. On the evening in question Mr. Whitehead never at any time left his place of employment. The other three men on the platform were employed as follows: When the two cars, with three seats in each car making six seats in all, would pull up for loading Jack Lampere would take care of the people in the two front seats, John Lampere the people in the two middle seats, and Earl
144 Cochran the people in the two rear seats. Each seat had a capacity of two people to a seat, although sometimes three people rode in a seat. At the time in question Mr. Whitehead and the boys were operating only the cars running on the west set of tracks since that set was sufficient to take care of the people then desiring to ride.

Jack Lampere's duty was to watch the cars on the side operating and get them onto the cog chain that pulled them out and up the first incline of the racer to
232 the apex of the first dip, from which point they started on their trip around the racer by gravity. It was also his duty to watch that people did not come down on the side that was not running.

The evidence is uncontradicted that the four men mentioned above were the only employees of appellants,

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that were in or around the racer or had anything to do with its operation on that night.

The appellee's evidence shows that Bernard L. Bettilyon and the appellee are brother and sister and that on the afternoon of June 22, 1940, Mr. Bettilyon,
72 from about 3:30 to 7:30 had been attending a 20-30
73 Club convention at the Newhouse Hotel, and during that time had had maybe six or seven cocktails; that about 7:30 that evening Mr. Bettilyon drove Mr. Cottrell to the Bettilyon home where Mrs. Cottrell already was, and the two couples had dinner there together. At about 9:30, in Mr. Cottrell's car, they all went to the Saltair Depot near the Fairgrounds and there boarded the train for Saltair. At Saltair the group paid their admission to the pavillion and went up to the dance floor, where they danced two or three times. Upon leaving the dance floor, about 10:30 to 10:45, and before the intermission at the dance floor, Mr. Bettilyon and his wife came
74 down to the foot of the pavillion stairs, where they met the appellee and her husband, Kenneth Webb. From that point the four of them went over to the racer and stopped at the point marked "F" on the drawing above, where they say they stayed for fifteen or twenty minutes waiting for a ride, the loading area serving the
76 cars on the west set of tracks being entirely filled up so that people were blocked to about the end of the loading area. The west line cars were the only ones operated on the tracks at that time. There were two empty cars standing on the east tracks near the loading platform, but the west cars were the only ones that were running and these were sufficient to take care of the

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crowd acccording to the testimony of appellant's witnesses.

After standing there for some time Mr. Bettilyon
77 and his group moved further along toward the east, at which point Mr. Bettilyon left his party with the statement that he would go down and get the boys to start up the other cars, and went to point "L," where leaning against the fence he spoke to one of the boys over on the loading platform asking that they start the cars on that side. He was told that they would be started later.
78 The conversation was in a friendly tone.

A little later he squatted down at about point "L" and still continued to talk with the boys on the loading platform. Eventually he said something to the effect that since they didn't want their (his group's) money they would take it and give it to another concession, and one of the boys said that if they didn't like the service he
79 knew what he could do, and Mr. Bettilyon said that he did, whereupon one of the boys said something to the effect "to get the hell out of there, something like that or mind my own business, and I said 'go jump in the lake' and then turned and started north. I was a little angry and I said 'go jump in the lake' and started on out." The fellow who made the remark was over on platform "A," the working platform. He leaped across and upon reaching Mr. Bettilyon turned him
80 around and shoved him back using both hands. Mr. Bettilyon said he was completely taken off his feet but he immediately swung at the appellant's employee and missed him. "Employee flew right in and the next
81 moment we were fighting for all we were both worth."

Thereafter Mr. Bettilyon said that two other men

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came from the platform and started right in fighting, so that at point "M" on the drawing there were three of them on him. He kept moving toward the north end of the platform, when Mr. Webb came in and started pushing these fellows away saying, " 'Here, here, you can't do this,' or something like that, 'there is no point in all this.' Then he turned and said, 'Come on Lou, let's get out of here' and I said 'Nothing would please
82 me more.' " Just about then Webb was hit and immediately the whole thing started again, two more men coming in until there were five or six men fighting Mr. Webb and Bettilyon. At point "O" Mr. Bettilyon was knocked out.

In the former case Mr. Bettilyon testified: "He (the man coming over from the loading platform)
88 turned me around, and shoved me, both. I swung immediately he stepped in and we were fighting."

At this point, from the testimony of Mrs. Bettilyon, it appears that Mr. Webb was knocked to his knees, then Mrs. Webb stepped out from behind the fence at about point "P" and said to the man, " 'You can't do that to my husband,' " and slapped him in the face and he
95 struck her knocking her down.
96

Mr. Webb by that time got to his feet and came over and lifted her to a sitting position, patting her cheeks, from which point she was taken over to a bench.

The appellant's evidence on these vital points is to the effect that while Jack Lampere was collecting his fares and getting the cars ready to go out he saw Mr. Bettilyon and his party of four, of whom appellee was one, starting past point "G" on the drawing going to-

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ward the east side and he motioned them back toward the west; that three of the parties stopped near the
234 corner of the fence but Mr. Bettilyon kept going down to point "L"; that while on his way there Jack Lampere motioned him two or three times to go back and at the same time asked him to go back on the other side. The reason for trying to keep these people back, was that with them around there other people would follow and cause the boys trouble in their operation of the cars that were in operation on the west side. When Jack had gotten the car he was then loading on its way, he went back and asked Mr. Bettilyon to go around on the other side, whereupon Mr. Bettilyon said, "what other side," and Jack told him the other side of the house, following which there was some further conversation. Then Jack
235 went to tend to another car, Earl Cochran, taking care
146 of the two rear seats, followed up the conversation with Mr. Bettilyon by asking him to go around on the other side but Mr. Bettilyon just stood there while other people continued to start around on the side where he was and had to be waved back. After collecting for one or two cars Earl again asked Mr. Bettilyon to go around on the other side and he stood up and told Earl to "put him around there, or I asked him to go out, is what I asked him to do, and he says come and put him around there, put him out, and I says 'well I will do that.'" Earl then crossed from platform "A" to platform at point "L" where Mr. Bettilyon was standing. Mr. Bettilyon was facing south and as Earl came up on the platform, facing him "I asked him again to go out and he took a swing at me * * * I grabbed hold of his hands by the wrist * * * and held him for a minute there

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and tried to get him out and he wrenched loose from me
148 and started to fighting. I was just getting out of the way of him as best I could * * * I never attempted to hit him at all. Then Jack came over on the platform and he swung at Jack and then Jack hit him." About this time Mr. Webb came down, "I think he swung at Jack and Jack hit him. I am not sure of that." Then John came over right after but before he came "there was Jack and I and Mr. Bettilyon and Mr. Webb, and we
149 were right around points 'M' and 'N.'"

During all this time there was fighting going on. About the time John came in Bernard Lynch, known as
150 "Slim" came over. He was in civilian clothes and was not working for the racer. "He took hold of Mr. Bettilyon and said, 'I don't know what it is all about but if Earl says you are going out you are going out.'" "Slim" took hold of Mr. Bettilyon by the arms from behind. At this time they were over near point "O," and with "Slim" holding Mr. Bettilyon and attempting to get him out, the fight was over. Then Mr. Bettilyon
151 wrenched loose and started to fight again, that is when Jack hit him, and about that time Mr. Cochran hit Mr. Webb who was over between "G" and "F." At this time Earl heard John say, "Watch out for him." This was with reference to another strange man who came in and took a swing at John and fell to the floor. Earl did not see Mrs. Webb until he heard someone say that "There is a woman been hit." When he looked around he saw her in a sitting position on the floor. "She was just sitting down crying. I never saw her stretched out and unconscious." "Then Webb and I forgot our fracas and Jack and I took her by the arms and picked

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her up and Mr. Webb says, 'I will take care of her,' and he took her."

Mrs. Webb, in giving her estimate of the time occupied by all the fight, said, "It wasn't a long fight,
133 'absolutely the fastest thing I have ever seen.' "

237 Jack Lampere's story of what happened to Mrs. Webb was that after he had hit Mr. Bettilyon, who had fallen down, he looked around and saw Mr. Webb over to the west from where he was standing and that just as he had taken a couple of steps toward Mr. Webb a hand came around over his shoulder and hit him in the face, without knowing who it was he turned around quickly with his open hand which came in contact with someone, he didn't know who at that time but afterwards found out that it was Mrs. Webb. Some man said, "Who hit that woman?" and he turned around to see Mrs. Webb sitting on the floor with her hands to her face crying. Earl Cochran came over and he and
238 Jack each taking an arm picked her up off the floor and gave her to Mr. Webb.

Mrs. Webb first filed her complaint on September 6, 1940, setting out an entirely different set of facts than that presented by her amended complaint filed December 12, 1940. It was not until she filed her amendment that she set out that she had suffered a miscarriage as a result of what happened.

Further facts as evidenced by the record will be developed in the argument of the errors hereafter assigned in support of appellants' appeal.

STATEMENT OF ERRORS

The errors of the trial court relied upon by appellants are as follows:

1. The court erred in overruling appellants' objection to, and permitting appellee as a witness in her own behalf to answer the following question on direct examination:

> "Can you tell the court and jury whether or not you were pregnant on the evening of June 22, 1940?" (Tr. 127.)

2. The court erred in denying appellants' motion to strike the question set out in the next preceding assignment and the answers thereto. (Tr. 128)

3. The court erred in overruling appellants' objection to the question asked by counsel on cross examination of appellants' witness Earl Cochran as follows:

> "Now, you have described those duties you have in connection with the collecting of fares. Is acting as a bouncer for the ejection or eviction of people that you think should be evicted, also a part of your duties?" (Tr. 160)

4. The court erred in overruling appellants' objection to the question asked by counsel of appellee's witness Dr. Giesy as follows:

> "Doctor, assuming that the plaintiff in this case had passed her regular menstrual period by about two weeks, and that on June 22, 1940, she was struck a blow of sufficient force to cause her to sit down violently, or to fall down on her back, and that some five or

six days thereafter she suffered a severe vaginal hemorrhage, accompanied by large and numerous blood clots, and that she thereafter so suffered and continued to suffer hemorrhages and blood flow and clots for ten days or two weeks thereafter, and that after that she continued to hemorrhage up until approximately January 1, 1941: Taking all of these facts, as I have just given them to you, together with your personal diagnosis and examination of the patient on October 22nd, together with your personal knowledge and experience in the field of medicine, what is your professional opinion as to whether or not on June 22, 1940, Mrs. Webb was or was not pregnant?" (Tr. 177)

5. The court erred in overruling appellants' objection to the question asked of appellants' witness Dr. Skidmore on cross examination as follows:

"Assuming that on the evening in question, on the 22nd of June, 1940, Mrs. Webb was struck a blow by the fist of a man, and she was propelled violently to the floor at the place she was standing, and was knocked wholly unconscious for some considerable period of time, that later she was revived and escorted to her automobile, with help, and that she went home, and five or six days thereafter she had nausea in the stomach; she had severe backaches; the side of her face was swollen and bruised; she suffered severe headaches, and five or six days after this occurrence she suffered continuous violent vaginal hemorrhages, accompanied by large clots of blood, for ten or fourteen days thereafter: Would that state of facts, Doctor, enable you to venture an opinion as to whether or not this hemorrhage, these hemorrhages that she suffered were as a result of the blows inflicted upon her?" (Tr. 206)

6. The court erred in refusing to give appellants' requested Instruction No. 3 reading as follows:

> "The court instructs the jury that defendants' employee was the best judge of what was necessary to defend himself against the attack of plaintiff and of the means to be used for his own protection. When the defendants' employee was attacked he was obliged to exercise his best judgment at that time as to what he should do in his own defense and his judgment is one which, if honestly and reasonably exercised, is controlling. It is absolutely controlling unless you find that his exercise of it at the time and under the circumstances, was such an exercise as was unreasonable under all the evidence in the case. So, if you find that from the nature of the assault committed upon defendants' employee by plaintiff he had a right to think he was being attacked by a person it was necessary for him to defend himself against, and in so acting his hand came in contact with plaintiff, without thought on his part that it might be a woman, then the plaintiff cannot recover in this action." (Exception Tr. 251)

7. The court erred in refusing to give appellants' requested Instruction No. 4 reading as follows:

> "You are instructed that the defendants' employee had a right to protect himself against an assault by plaintiff. If you find that plaintiff assaulted defendants' employee in such a manner and under such conditions as to naturally excite an ordinarily careful and prudent man in the place of said employee under the same circumstances and conditions, then the said employee cannot be held to the greatest nicety in the calculation of the amount of force which he should use; and even if he did use more force than was necessary, still if under

the circumstances he acted as an ordinarily careful and prudent man under the influence of plaintiff's conduct, as you find it to be, would have acted under the same circumstances and conditions, then you should find in favor of the defendants—'no cause of action.'" (Exception Tr. 251)

8. The court erred in refusing to give appellants' requested Instruction No. 5 reading as follows:

"You are instructed that these defendants have the full right to determine the operation of the scenic racer and that they, through their servants, having determined not to operate the east set of tracks or green cars, then Bernard L. Bettilyon had no right to go on that side of the racer platform. You are further instructed that having gone on the east side if you find that his being there did in any way interfere with or cause trouble to defendants' servants in their operation of the racer that the servants of defendants had a lawful right to use such reasonable force as was necessary, after requesting Bernard L. Bettilyon to leave that part of defendants' property, to remove him from the place in question. You are also instructed that if in using force to remove said Bernard L. Bettilyon that he attempted to or did start to fight or hit the servant or servants of defendants and as a result of such assault or attempted assault the said Bernard L. Bettilyon was later injured, and that thereafter this plaintiff's husband voluntarily came into the fight and that later this plaintiff herself left a place of safety and slapped defendants' employee in the face, as a result of which plaintiff was struck by said employee, then plaintiff cannot recover in this case and your verdict will be for the defendants, and each of them, 'no cause of action.'" (Exception Tr. 251)

9. The court erred in refusing to give appellants' requested Instruction No. 6 reading as follows:

> "If you find from all the evidence that plaintiff struck defendants' employee when said employee was not expecting such an assault and said employee had reasonable grounds to believe and did believe that it was necessary to protect himself and in protecting himself he turned quickly and struck plaintiff but used no more force or violence than to him honestly and reasonably appeared necessary to repel a threatening injury, then under such circumstances the defendants' employee did no wrong and plaintiff has no right to recover damages in this case." (Exception Tr. 251)

10. The court erred in refusing to give appellants' requested Instruction No. 7 reading as follows:

> "You are instructed that Bernard L. Bettilyon had no right to be on the east or green car side of the platform in question without the consent of defendants. So, if you find that he, being on that side without right, refused to leave the east side of said platform when so requested by defendants' servants and that said servants then went to said Bernard L. Bettilyon at his dare and invitation to induce him to vacate the east side of said platform, and that as a result of the effort of defendants' servants to induce him to leave that part of defendants' premises the said Bernard L. Bettilyon, while said servants were in the exercise of only such reasonable force as was necessary to remove plaintiff, struck at defendants' servant and started to fight as a result of which he suffered some injury, then the plaintiff in this case cannot justify herself in leaving a place of safety and committing an assault upon the employee of these defendants and therefore plaintiff cannot recover in this case and your verdict must be for the defendants,

and each of them, and against the plaintiff—'no cause of action.'" (Exception Tr. 251-252)

11. The court erred in refusing to give appellants' requested Instruction No. 8 reading as follows:

> "You are instructed that the lawful owner or occupant of premises may rightfully restrict the use of his premises to his business guests and this he may do by word of mouth as well as by erecting signs or barricades or by using other means of giving notice of the restricted use. If a business guest refuses to quit a restricted portion of the owner's or occupant's premises after verbal request so to do, and reasonable opportunity has been given him to depart, he thereby becomes a trespasser and may be ejected by the use of such reasonable force as is necessary under the circumstances. So, in this case, if you find the acts of which the plaintiff complains arose out of the use of such force on the part of the employees of the defendants or an exercise on their part of the right to defend themselves against attack by Mr. Bettilyon, then plaintiff cannot recover in this action." (Exception Tr. 252)

12. The court erred in refusing to give appellants' requested Instruction No. 9 reading as follows:

> "You are instructed that if you find from the evidence that when Bernard Lynch went into the trouble going on at the place in question here the altercation was brought to a stop by his taking hold of Mr. Bettilyon and attempting to get him away from the trouble and that Mr. Bettilyon then broke away from him and charged at Jack Lampere, who at that time in self-defense struck Mr. Bettilyon, that then Mr. Bettilyon was the aggressor; and if you further find that

Mr. Webb was still in the altercation along with Mr. Bettilyon then I instruct you that plaintiff had no right to leave a place of safety, go up to Mr. Lampere and strike him, and that she cannot recover in this action against these defendants." (Exception Tr. 252)

13. The court erred in refusing to give appellants' requested Instruction No. 12 reading as follows:

"The plaintiff in this action has alleged that at the time of the alleged assault and battery she was pregnant and that as a result of said alleged assault and battery she suffered a miscarriage. The court instructs you that there is no substantial evidence that plaintiff was pregnant at the time of the alleged assault and battery and you are therefore instructed to disregard this phase of the case in your deliberations." (Exception Tr. 252)

14. The court erred in refusing to give appellants' requested Instruction No. 13 reading as follows:

"The plaintiff in this action has alleged that at the time of the alleged assault and battery she was pregnant and that as a result of said alleged assault and battery she suffered a miscarriage. The court instructs you that there is no substantial evidence that the miscarriage, if any, was caused by or contributed to by the alleged assault and battery and you are therefore instructed to disregard this phase of the case in your deliberations." (Exception Tr. 252)

15. The court erred in failing and refusing to instruct or otherwise present to the jury the appellants' theory or theories of their defense or defenses to the alleged cause of action sued upon by plaintiff. (Exception Tr. 252)

16. The court erred in giving to the jury Instruction No. 4 reading as follows:

> "The court instructs you, if you find from the evidence that the plaintiff's admission to Saltair Beach was paid, that she was a guest and had a right to remain there as long as said resort remained open to the public that evening." (Exception Tr. 246)

17. The court erred in giving to the jury Instruction No. 5 reading as follows:

> "The court instructs you if you find from the evidence that the plaintiff was apprehensive that her husband and brother, or either of them, were in danger of bodily harm, and that she interceded in the affray in order to try to protect either or both of them, that she was justified in doing so. If you further find from the evidence that as a result of her participation in the affray she was rendered unconscious by a blow from one of the defendants' employees, the mere fact that she participated in the affray would not bar her from recovering damages from the defendants." (Exception Tr. 246)

18. The court erred in giving to the jury those parts of Instruction No. 5 reading as follows:

> "First. 'The court instructs you if you find from the evidence that the plaintiff was apprehensive that her husband and brother, or either of them, were in danger of bodily harm, and that she interceded in the affray in order to try to protect either or both of them, that she was justified in doing so.'" (Exception Tr. 253)

"Second. 'If you further find from the evidence that as a result of her participation in the affray she was rendered unconscious by a blow from one of the defendants' employees, the mere fact that she participated in the affray would not bar her from recovering damages from the defendants.' " (Exception Tr. 254)

19. The court erred in giving to the jury Instruction No. 6 reading as follows:

"A person is justified in using sufficient force to protect members of his or her family provided the apparent danger is such as to induce one exercising a reasonable and proper judgment to interfere to prevent a consummation of the injury." (Tr. 246)

20. The court erred in giving to the jury Instruction No. 7 reading as follows:

"The court instructs you that if you believe from the evidence that the plaintiff was pregnant at the time she was rendered unconscious by the blow delivered by one of the defendants' employees, and as a result of said blow and being knocked to the floor she suffered a miscarriage and thereby the loss of her unborn child, you may award her money damages for the loss of said unborn child." (Tr. 246-247)

21. The court erred in giving to the jury those parts of Instruction No. 7 reading as follows:

"First. 'The court instructs you that if you believe from the evidence that the plaintiff was pregnant at the time she was rendered unconscious by the blow delivered by one of the defendants' employees.' (Exception Tr. 254)

"Second. 'And as a result of said blow and being knocked to the floor she suffered a miscarriage and thereby the loss of her unborn child, you may award her money damages for the loss of said unborn child.'" (Exception Tr. 254)

22. The court erred in giving to the jury Instruction No. 10 reading as follows:

"The court instructs you, members of the jury, that if you find the issues in this case in favor of plaintiff and against the defendants, you may find for the plaintiff such a sum as will compensate her for the following damages, not to exceed $5,000.00:

1. The actual personal injuries which she suffered;
2. The consequent pain and suffering which she suffered as a result of her physical injuries;
3. Money damages for the loss of her unborn child as a result of said miscarriage.

In addition to the amount named above, you may also assess such damages as will compensate for the loss or injury to her clothing, not to exceed the sum of $75.00." (Tr. 247-248)

23. The court erred in giving to the jury those parts of Instruction No. 10 reading as follows:

"First. 'The actual personal injuries which she suffered.'" (Exception Tr. 254)

"Second. The consequent pain and suffering which she suffered as a result of her physical injuries." (Exception Tr. 254)

"Third. 'Money damages for the loss of her unborn child as a result of said miscarriage.'" (Exception Tr. 255)

"Fourth. 'In addition to the amount named above, you may also assess such damages as will compensate for the loss or injury to her clothing, not to exceed the sum of $22.50,' and" ((Exception Tr. 255)

"Fifth. 'The total amount of all damages which you may find for the plaintiff cannot exceed the sum of $5022.50.'" (Exception Tr. 255)

24. The court erred in receiving the verdict and entering judgment thereon in that the verdict is excessive and against the law.

25. The court erred in denying appellants' motion for a new trial, which motion was based upon the grounds recited in the Notice of Intention to Move for a New Trial (Tr. 265) which grounds are as follows:

"1. Irregularity in the proceedings of the court, jury or adverse party, abuse of discretion by the court which prevented the defendants from having a fair trial.

"2. Misconduct of the jury.

"3. Accident or surprise which ordinary prudence could not have guarded against.

"4. Excessive damages appearing to have been given under the influence of passion or prejudice.

"5. Insufficiency of the evidence to justify the verdict or decision, and that it is against the law.

"6. Error in law occurring at the trial and excepted to by the defendants.

"7. Newly discovered evidence material for the defendants which it could not, with reasonable diligence, have discovered and produced at the trial." (Exception Tr. 265)

ARGUMENT

I.

APPELLANTS' THEORY

In presenting appellants' defense in this case counsel filed with the court various requests which counsel conceived of as stating the law applicable to appellants' theory of the issues in controversy. The court did not instruct the jury as requested by appellants and failed wholly to give to the jury any instructions that did present appellants' theory of the case.

It was and now is appellants' theory of this case, which is sustained by evidence at every point, that:

The appellee and her party, at the time of the altercation or subsequent thereto, never had offered to pay or paid the required fee for a ride on the racer; that if they had ever intended to ride they had abandoned the idea as expressed by them in saying that they would spend their money at some other concession; (Tr. 78) that the fact was that Mr. Bettilyon, brother of appellee, was the leader of the party and that following his approximately four hours at the highball convention at the Newhouse Hotel (Tr. 72-73) that he was at Saltair to do foolish and uncalled for things for the amusement of his party; that in going down on the east side, he was at a point where he had no right to be, therefore, appellants' boys after several times inviting him to leave were fully within their rights in going over to him to try and get him around where he would not cause them trouble in the operation of the racer; that for him to be where he was created a constant hazard to the safety

of the racer operation, because it diverted the attention of the boys from their work; that when they invited him to leave and he did not, he became a trespasser and was subject to removal; that the evidence showed that when Earl Cochran went over at Bettilyon's invitation to assist him to a point of safety and under appellee's testimony was using no more force than necessary (Tr. 146-7) and under appellants' evidence using no force at all, Bettilyon "swung at him"; (Tr. 80) and thereby became the aggressor in the altercation that followed; that under appellants' evidence and particularly "Slim" Lynch's testimony (Tr. 148) which is that of a disinterested witness, with Mr. Webb, appellee's husband, coming in, the entry of Jack Lampere into the affray was justified; that when "Slim" came in and took hold of Mr. Bettilyon and started removing him that the entire matter had come to a settlement (Tr. 148) and that when Mr. Bettilyon broke loose and started to fight anew, again, he was the aggressor and wholly responsible for what happened; that when Mr. Bettilyon was knocked down the entire brawl was again at a point of rest; that the appellee in stepping out from a place of safety and striking Jack Lampere was in no better position than was Mr. Bettilyon or her husband and further that there was no excuse for her as a reasonably prudent person stepping out and striking Jack as she did at the time she did.

We maintain further that the evidence as to appellee's pregnancy and alleged miscarriage was not sufficient, but if it were admitted, for the sake of argument, then damages are so excessive as to show prejudice on the part of the jury.

In considering the appellants' assignments of error counsel will group them under just as few main heads as practicable.

II.

ASSIGNMENTS OF ERROR HAVING TO DO WITH PREGNANCY AND MISCARRIAGE

ASSIGNMENTS OF ERROR NOS. 1 AND 2

In the first Assignment of Error the appellants contend that the court erred in overruling appellants' objection to and permitting appellee, as a witness in her own behalf, to answer the following question on direct examination:

> "Can you tell the court and jury whether or not you were pregnant on the evening of June 22, 1940?" (Tr. 127)

Appellants' counsel in making his objection to the question stated that the witness was not shown to be qualified to make a conclusion of that kind and the trial court in overruling the objection said:

> "That would depend. After about thirty days they may know whether they are pregnant or not." (Tr. 127)

In answer to the question appellee stated that she had missed her monthly period which was about two weeks prior to June 22nd. Appellants' counsel then renewed his objection and moved to strike both the question and answer and the court denied the motion. (Tr. 128) This left the jury to infer that the court was of the opinion that the appellee was pregnant.

The appellee was a lay witness and as such was not competent to testify as to whether she was pregnant at the time of the alleged assault and battery. The rule is well settled that

where one's physical condition is of such a character as to require skilled and professional men to determine the same, the question is one of science and must necessarily be determined by the testimony of skilled professional persons. In the case of *Oklahoma Hospital v. Brown,* (*Okla.*) 208 Pac. 787, the court in its opinion said:

> "It is the settled rule that where the injuries complained of are of such a character as to require skilled and professional men to determine the cause and extent thereof the question is one of science and must necessarily be determined by the testimony of skilled professional persons."

In *Skidmore v. Oklahoma Hospital,* (*Okla.*) 278 Pac. 334, the court in its opinion said:

> "It is contended by defendant that the evidence is wholly insufficient to establish that the distention of the bladder caused the stitches to tear and that the tearing of the stitches caused the bladder to fall; that there is no expert testimony supporting this theory of plaintiff's case.
>
> "Two physicians testified on behalf of plaintiff—the physician who performed the operation and another. Both physicians testified that in their opinion the distention of the bladder did not cause the stitches to tear, and that the tearing of the stitches was not the cause of the falling of the bladder, but that the same was occasioned by natural absorption of the stitches.
>
> "We think, in order to sustain this theory of her case, it was necessary that she establish the same by expert testimony. In the case of St. L. & S. F. Ry. v. Criner, 41 Okl. 256, 137 P. 705, it is said: *'Where the injuries are of such character as to require skilled and*

professional men to determine the cause and extent thereof, the question is one of science, and must necessarily be determined by the testimony of skilled professional persons.' See, also, A., T. & S. F. Ry. v. Melson, 40 Okl. 1, 134 P. 388, Ann. Cas. 1915D, 760.

"The rule announced in these cases is well established, and, if this were the only element of damages sought to be recovered, the judgment of the trial court would be correct."

In *St. Louis Mining & Smelting Company, et al. v. State Industrial Commission,* (Okla.) 241 Pac. 170, the court said and held:

"We need not deal at length with the first part of the question, for in our judgment the latter part is determinative in this case; that is, was the 'accident' the cause of the disability? As to the effects of the gas upon his person, the claimant was the only one who testified in his behalf, and in brief his testimony, in substance, was:

" 'I was gassed. I remained at work with slight ill effects, two days thereafter, and am now disabled.'

"No one skilled in scientific knowledge was brought who said that the event of claimant being slightly gassed caused his disability. On the other hand, the undisputed testimony in the record from the only witness qualified to testify concerning the causes and effects of internal diseases such as suffered by claimant was, in substance, that the disability of claimant was caused by anthracosis, and solely from such occcupational disease." * * *

"We are of the opinion, from a careful examination of the record, that the claimant failed to produce any competent evidence to form a basis for the finding by the commission that the 'accident,' as claimed, resulted in the disability."

ASSIGNMENTS OF ERROR NOS. 13 AND 14

The appellee in her amended complaint alleged that at the time of the assault and battery first "she was pregnant" and second that

> "as a result of the injuries inflicted upon her by said malicious assault and battery that approximately six days thereafter she suffered a miscarriage thereby losing her unborn child. * * *." (Tr. 13-D)

The appellee failed to produce evidence which would justify either of these questions being submitted to the jury. The appellants urgently insist that the court erred in refusing to give their requested instruction number 12 which reads as follows:

> "The plaintiff in this action has alleged that at the time of the alleged assault and battery she was pregnant and that as a result of said alleged assault and battery she suffered a miscarriage. The court instructs you that there is no substantial evidencec that plaintiff was pregnant at the time of the alleged assault and battery and you are therefore instructed to disregard this phase of the case in your deliberations." (Exception Tr. 252)

The only evidence tending in any way to show that appellee was pregnant at the time of the alleged assault and battery is found in appellee's own testimony and in the testimony of Doctor Giesy and Doctor Skidmore. The appellee's testimony which was made in response to a question asking whether she was pregnant on the evening of June 22nd was that she had missed her monthly period a little over two weeks prior to that time. This testimony, in view of the testimony of Doctor

Giesy, gives very little strength to appellee's contention as Doctor Giesy on cross examination stated that it is not unusual for a woman to miss her period without being pregnant and that lots of women have irregular menstrual periods.

The appellee further stated that

> "Six days after this happened I started to hemorrhage and I hemorrhaged continuously up to the first of January of this year." (Tr. 129)

Here again the appellee's testimony adds little to her contention as her own witness, Doctor Giesy, on cross examination stated that you could not definitely determine the absolute cause of the condition which he found in Mrs. Webb and that it is almost impossible for any person to give a listing of the things that may cause a displacement of the uterus because there are so many. (Tr. 187, 191)

Doctor Giesy upon being asked a hypothetical question stated, that in his opinion appellee was pregnant on June 22nd. (Tr. 179) However, on cross examination Doctor Giesy's testimony on this point was weakened considerably as it appeared that his opinion was based entirely upon probabilities and conjecture and that the conditions which he found gave rise merely to a probability of pregnancy. (Tr. 189-190)

The jury in this case should not have been permitted to consider and decide upon a fact where the only evidence supporting such fact was based upon mere probability and conjecture.

The court erred further in refusing to give defendants' requested instruction number 16 reading as follows:

> "The plaintiff in this action has alleged that at the time of the alleged assault and battery she was

> pregnant and that as a result of said alleged assault and battery she suffered a miscarriage. The court instructs you that there is no substantial evidence that the miscarriage, if any, was caused by or contributed to by the alleged assault and battery and you are therefore instructed to disregard this phase of the case in your deliberations." (Exception Tr. 252)

The appellee alleged and had the burden of proving that the alleged miscarriage was suffered *"as a result of* the injuries inflicted upon her by said malicious assault and battery." Evidence which would justify the court in submitting this question to the jury is entirely lacking.

The appellee's only attempt to connect the alleged assault and battery up with the fact that six days after she started to hemorrhage and suffered a miscarriage was in the hypothetical questions put to Doctor Giesy, (Tr. 177 to 180) and Doctor Skidmore (Tr. 206 to 209). The answers given by each of the doctors are that a blow sufficiently violent to propel appellee to the floor would be sufficient to cause a miscarriage. But this fact becomes merely a probability as the doctors thereafter state that numerous things may cause the conditions from which appellee complains.

With the alleged assault and battery being only one of the many things which could cause the conditions complained of by appellee, the jury was left entirely to speculate and conjecture as to the cause of these conditions. If there had been sufficient evidence to establish the appellee's pregnancy without it being based upon mere possibilities, conjecture and speculation, the evidence that there was a miscarriage that was *caused by the assault and battery* is much too speculative to justify the question being submitted to the jury.

In *Jones et al. v. Pierce et al.,* (Louisiana 1935) 162 So.

215, action was brought to recover damages arising out of an automobile accident. Plaintiff contends that she was four or five months pregnant and that as a result of the accident the foetus of an unborn child was killed, rendering necessary its removal by surgeons. The trial court dismissed the suit and made the following statement:

> " '* * * I am not in the slightest degree convinced that the slight accident which I have described had anything to do with this abortion. At the very best it is a mere possibility and in a matter of serious import to myself I would not act on it, as I do not believe that this accident had anything to do with the abortion.' "

In affirming the trial court's decision the appellate court said and held:

> "The record shows that Mrs. Jones, prior to the accident, was a normal, healthy woman, and that she, on the night of the accident, had been pregnant for about four or five months. She was seated on the front seat of her husband's car when, in its course across St. Charles avenue, it was brought to a stop to permit a street car to pass ahead of it. A few feet of the rear portion of the car extended into the roadway of St. Charles avenue, and while it was in this position the Pierce car approached. Pierce was unable to entirely stop it or to completely avoid striking the rear of the Jones car. The result was a blow which pushed the Jones car forward about one foot, and which swerved it sidewise about three feet. Mrs. Jones received no external injuries, bruises, or abrasions, and there was nothing to indicate to her, or to any one else, that she had been in any way injured, except that she stated that 'my stomach kept quivering.' When asked

whether the impact was a 'terrible blow,' she said, 'No —I don't think it was.' She herself also testified that it did not physically injure her in any way. She returned to her home and during that night gave no indication whatever of having been injured. On the next day she reported for her work as a comptometer operator, and, according to her testimony, 'worked that night until 8:30,' and even then evidently felt perfectly well, because she did not go from her place of employment to her home, but went to Loyola University to wait until her husband, who was a student there, could complete his studies at the night school. She then went to her home and retired, still without any premonition or indication of internal injuries or disorders, and she slept until about midnight, when she was awakened by the fact that she 'was losing a lot of blood.' She went at once to a hospital, and there the physician in charge was successful in stanching the flow. On the next morning she returned to her home, and, upon calling at the office of her own physician, was examined by him, with the result that he found one of the cords protruding in the vagina, and concluded from this that she had 'had an abortion'; that the foetus was dead, and that she should 'have the uterus cleaned out at the hospital.'

"It will be noted that, except for very slight nervous shock at the time of the accident, no physical injury was sustained, no labor pains commenced, and no symptoms of an impending miscarriage manifested themselves, and that it was not until about thirty hours after the collision that she suffered to any appreciable extent. In the meantime, she went about all her duties without pain and continued at her work for a full day and for a part of the next night. *It is unbelievable that, had the umbilical cord been severed at the time of the accident, there would have been no immediate evidence of that fact. This cord supplies to the foetus*

the blood and later the nourishment necessary for its development and growth, and its severance would, unquestionably, have produced immediate hemorrhage, pain, and suffering." * * *

"* * * *There is no doubt that there are many other possible causes for misfortune such as Mrs. Jones sustained. One doctor testified to these other possible causes. We cannot conclude that the district judge was in error in deciding that the proof does not show with sufficient certainty that the cause was the accident complained of.*"

In *Edenfield, et al. v. Wheless, et al.,* (Louisiana, 1934) 151 So. 659, action was brought to recover damages alleged to have been caused by an automobile accident. Mrs. Edenfield at the time of the accident was four and one-half months pregnant. The accident occurred on July 25, 1932, and on July 28, 1932, labor pains came on and a Cæsarean operation was performed. The question for determination was whether the condition of Mrs. Edenfield was caused from the accident or from a kidney condition which existed prior to the accident. In affirming a judgment of the lower court the appellate court said and held:

" * * * He (Dr. Dickson) was asked if a blow could possibly have caused the trouble suffered by Mrs. Edenfield, and he replied, 'Yes, possibly.' He was then asked if it was a probability in this case, and replied: 'Well, I do not know. I did not take that into consideration. I did not make a cystoscopic examination.'

"We have studied with care the testimony of Dr. Stamper, who treated Mrs. Edenfield for two and one-half years, to find where he gives as his opinion that the trouble with Mrs. Edenfield after the accident was due to the injuries received in the accident, and we have

failed to find it. Each of these reputable physicians and surgeons treated her before and after the accident. Each performed an operation on her, and no doubt would be inclined to be as favorable to her cause as possible, *and if they are not willing to venture an opinion that the slight injury received by her was the cause of her trouble thereafter, we think the court would have to go a long way to do so. No doubt it is possible that the injury could have caused the trouble, but we cannot decide cases on possibilities alone.* The lower court held that the condition of Mrs. Edenfield after the accident was not caused by the accident and slight injury received there, and we find no manifest error in its holding. It rejected the claim of Mr. Edenfield and allowed to Mrs. Edenfield damages in the sum of $100, for immediate shock on the date of the accident, and rejected all other demands.

"There is no manifest error in the judgment, and it is affirmed."

In *Consolidated Coach Corporation v. Garmon,* (Kentucky 1930), 26 S. W. (2d) 20, appellee obtained a judgment against appellant for $2,075 for injuries which she claimed she received while riding on a bus operated by appellant. In its opinion the court said and held:

"A more serious question is presented, however, by another point urged against the instructions, but not pressed with the same vigor as the point just disposed of. It is insisted that the miscarriage was not shown to have been the direct result of the collision. We cannot agree with that contention. The evidence was sufficient to authorize the jury to determine that it resulted from the injury received because of the collision, and that the injury was the direct cause of the miscarriage. The evidence presented a further question

of damages which went into the realms of speculation and was too remote to be considered as the direct result of the injury. Appellee claims that the miscarriage resulted in injuries and suffering that may be attributed to the miscarriage itself and not to the injury. *The evidence does not present facts sufficient to enable a jury to determine that the continued suffering and injuries resulting from the miscarriage were caused by the collision. These may have been occasioned by reason of other conditions having no connection with the collision. The physical condition of appellee, the treatment she received by the physicians at the time of the miscarriage, and care and attention received by her after the event, may have been the cause of the continued disorders about which she complains.* The evidence is sufficient to show that she suffered between the time of the accident and until the time of her miscarriage, and, of course, the miscarriage resulted in certain natural suffering which may be traced directly to the collision. *But the evidence was not such as to show that the lingering ailments and disorders which continued on down to the trial were the direct results of the collision.* Dr. Johnson, who testified for appellee, stated that certain pains on the side and certain disorders attending the natural functions of appellee after the miscarriage were probably attributable to an infection following the miscarriage. This evidence was objected to and overruled and proper exceptions were reserved. There was evidence along this same line given by the doctor. He testified that an operation would probably be necessary for the removal of some of the genital organs. This evidence allowed the jury to find for appellee for suffering occasioned by the miscarriage, when the disorders were probably caused, according to the doctor, by an infection following the miscarriage. This evidence should not have been admitted. It is not shown that her suffering growing out of the infec-

tion was the direct result of the collision. Instead of an instruction, as contended for by appellant, limiting the recovery to the injuries other than those not directly connected with the collision, the court should have sustained objections to the evidence relating to these sufferings. The instructions, therefore, were proper, but incompetent evidence was admitted, and that is one of the grounds for a new trial."

In *Ford v. Nicol et al.* (Michigan 1933), 246 N. W. 130, the court said and held:

"The testimony did not disclose evidentiary facts. The expert had but a theory that plaintiff was sterile because she did not become pregnant; that she did not become pregnant because of lack of ovulation; that lack of ovulation was because of shock to her nervous system. *Probative evidence must be something more tangible than a mere pyramiding of theories. The witness gave no satisfactory date upon which to base his conjectures. The sterility here alleged was too remote and speculative, considering the nature of the injuries, to warrant the verdict rendered.* Incapacity to bear children, except occasioned by direct injury to, or disease of, sexual organs or reproductive functions, is difficult to prove, but cannot be permitted to rest upon conjecture of such inability and speculation as to the cause of such conjectured inability. We need make no quotations from the expert evidence in contradiction of the postulates of the expert called by plaintiff. The evidence must show sterility in fact and occasioned by direct bodily injuries or the proximate result thereof."

In *Symington v. Graham* (Maryland 1933) 169 A. 316 plaintiff sued to recover damages which she claimed resulted

from a collision occurring February 12, 1932. The appellate court in reversing the judgment for the plaintiff said and held:

> "The impact of the collision threw the plaintiff from the front seat so that her face struck the windshield, and she was thrust forward with her knees jammed fast underneath the cowl board of the automobile. She was momentarily stunned, and her nose bled freely from the force of the blow of the windshield, but she got out of the automobile, and assisted her husband with the defendant, who was unconscious and badly injured. After the defendant had been carried away to a nearby store, the plaintiff felt nauseated and sick and walked to a neighboring farm house where she stayed until the defendant was removed in an ambulance when the plaintiff went to the store where the doctor examined her to see if there were any bones broken in her nose. After this examination, the plaintiff was put in an automobile and sent home in a nervous condition. Her nose became very much swollen and black to the eyes, and she became sore, stiff, and bruised, but had no pain until the evening of the day following the casualty, when pain, which was more pronounced on the right side of the abdomen, began. She stated that the manner in which her knees had struck the automobile had caused the 'jar and the pain through my (her) stomach.' She had bruises on both legs which were sore, and remained for four weeks before they were entirely gone. The plaintiff described these abdominal pains as 'intense stomach pains' which continued for a period of three or four weeks. She was then able to proceed with her household duties.
>
> "While the severe stomach pains ceased at the end of three or four weeks after the injury, she experienced slight similar pains until the end of two months after the accident. After this period, the pains were succeeded by an unusual soreness and drawing sensation

in the left side which continued until the day she went to the hospital on July 3. The plaintiff thus described the discomfort: 'The burden seemed too low, and just uncomfortable; just a pulling and drawing sensation day and night.' " * * *

"*In order to prevent imposition it is necessary to keep constantly and firmly in view the elementary rule that before a plaintiff can recover it is necessary for him to show a damage naturally and reasonably arising from the negligent act.* The burden is upon the plaintiff to prove that the particular consequence for which a pecuniary finding is sought is the direct result of a wrongful act or omission by the defendant. The plaintiff fails in this burden, although he proves the negligence and the injury, unless he show that the particular injury would in ordinary course flow from the negligence. Abend v. Sieber, 161 Md. 649, 158 A. 63; Benedick v. Potts, 88 Md. 52, 40 A. 1067, 41 L. R. A. 478; Beven on Negligence (4th Ed.) vol. 1, pp. 67, 85.

"The plaintiff has failed in this case to meet this burden of proof. The testimony of the doctor, whom she called, is clearly to the effect that there is no natural and reasonable connection between the accident of February 12, and the plaintiff's illness and operation of July 3. Nor is this connection shown by any other testimony on the record. *Conjecture, speculation, or mere possibility, must not usurp the place of proof of the essential facts in issue if the trial of facts is to remain a rational and just procedure.* For the error in refusing the motion to strike out the testimony with reference to the pain, suffering, and distress of the plaintiff attributable to her illness and its resulting operation, *and in declining to grant the defendant's prayers excluding these matters from the consideration of the jury in estimating the amount of damages sustained, the judgment must be reversed.*"

III

ASSIGNMENTS OF ERROR BASED ON ADMISSION OF EVIDENCE UNDER CROSS-EXAMINATION

ASSIGNMENT OF ERROR NO. 3

In the third Assignment of Error the appellants insist the court erred in permitting counsel for appellee to ask Earl Cochran, appellants' witness, on cross-examination over our objection this question:

> "Now, you have described those duties you have in connection with the collection of fares. Is acting as a bouncer for the ejection or eviction of people that you think should be evicted, also a part of your duties?" (Tr. 160)

The first sentence of the question, "Now, you have described those duties you have in connection with the collection of fares" means nothing because it is merely a statement by counsel of what the witness had finished doing. It does emphasize, however, that counsel had in mind to unfairly discredit the witness before the jury when he next said

> "Is acting as a bouncer for the ejection or eviction of people that you think should be evicted also a part of your duties?"

This statement, first, is an open attempt on the part of counsel to embarrass the witness before the jury in that counsel injects into the picture a rough situation such as a bar-room or the like, where the "bouncer" is a required part of the equipment.

Second, it assumes that appellants maintained such a place and that a "bouncer" was necessary and that this boy was of such a character, that he would act as a bouncer.

Third, the statement assumes that as such "bouncer" he could eject or evict people whom he thought ought to be thrown out regardless of who they were or what they were doing.

There was no evidence in the record which would warrant any inference that appellants employed anyone to act as bouncers in and about the giant racer, and particularly that this witness was employed for any such purpose. Neither is there anything in the record that the appellants employed anyone to eject or evict people that they "think should be evicted," or that this particular witness was so employed. The record shows upon its face that the sole and only reason for asking this question was to prejudice the mind of the jury against the appellants.

That it is error for counsel on cross-examination to ask questions on such entirely collateral issues in an attempt to humiliate the witness and to *assume facts such as were assumed* here is clearly established by the following cases:

Johnson vs. Richards, (Idaho) 294 Pac. 507, where the court gave:

> "The court properly sustained an objection to the following question asked respondent on cross-examination: 'Isn't it a fact that by reason of the financial condition of your husband and the troubles over your extravagances, that suits were instituted against him here?' *The question assumed there was trouble over respondent's extravagances, as to which there was no evidence. It was duplicitous and not proper cross-examination.* For like reasons the court did not err in sustaining objections to the following question: 'At that time and prior thereto, you had serious quarrels

covering a long period of time, by reason of and on account of your attempting to poison him, didn't you?' "

Annarina vs. Boland, (Md.) 111 Atl. 84:

"The fifth exception relates to the action of the court in refusing to permit the same witness to be asked on cross-examination if he did not live at his mother's home with the woman he married, before he married her. Such testimony was entirely collateral to any issue in the case and did not bear in any way on the credibility of the witness and its only possible purpose was to degrade and humiliate him, and for that purpose it was inadmissible. Avery v. State, 121 Md. 236, 88 Atl. 148, and the question was properly refused. The same witness was later asked if his father had not sworn out a peace warrant against his mother. The court very properly refused to permit this question, and its ruling is the subject of the sixth exception. Even if the fact sought to be proved were relevant, that was not the way in which to prove it."

Essex vs. Millikan, et al., (Ind.) 164 N. E. 284:

"Appellees' objection to this question was sustained. This ruling is claimed to be reversible error. The question assumes facts not covered by the direct testimony of the witness, but in conflict with the direct and positive testimony of the witness. The question assumes a copy of the lease in question had once been in the possession of Williams, and that, through some manner, had thereafter gotten into the possession of the witness. There is no claim that Exhibit 1 was ever in the possession of Williams or that appellant ever parted with its possession. As was said in Pennsylvania Co. v. Newmeyer, 129 Ind. 401, 28 N. E. 860, quoting from Starkie on Evidence: 'Although upon cross-ex-

amination a counsel may put leading questions, those questions must not assume facts to have been proved which have not been proved, or that particular answers have been given contrary to the facts.' There was no reversible error in the action of the court in sustaining the objection."

See also the rule as stated in the following cases:

Cristofaro v. Brenfleck, 184 A. (N. J.) 619, point (5);
Maloney v. Carey, 9 A. (2d) (N. J.) 791, point (3);
Bradburn Motors Co. v. Moverman, (R. I.) 7 A. (2d) 207, point (5).

It is also error to assume in a question as it is here assumed, that there was some duty upon the appellants which did not exist either as a matter of law or as shown by the facts.

Wise v. Schneider, (Ala.) 88 So. 662:

"Where a statute or ordinance has prescribed the duties of persons who are driving vehicles over highways, with respect to the safety of other vehicles or persons, it is proper for the trial judge to instruct the jury as to the legal duties thus imposed. But it was not proper to ask defendants' witness Newsome, who was in the car, but not driving it, 'Don't you know, as a driver of a car, that it is your duty to keep to the right when turning a corner,' and 'to keep close to the right when turning a corner?' The question assumes the existence of a duty not prescribed by any statute, nor by any municipal ordinance of Cullman, so far as appears, and it was not within the legitimate range of a general cross-examination of the witness."

From the foregoing and from the size of the verdict in this case it is certain that the court erred in overruling our

objection to the question first hereinabove set out and that the error warrants a reversal of this judgment.

ASSIGNMENTS OF ERROR NOS. 4 AND 5

Appellants have assigned as errors number 4 and number 5 the court's over-ruling of their objections to the hypothetical questions propounded to appellee's witness, Doctor Giesy, and appellants' witness, Doctor Skidmore. Appellants assign these errors on the same grounds that were argued at the time the questions were asked, namely, that the questions contain statements of fact which were not supported by the evidence and that the facts were colored and exaggerated to the extent that they were misleading. The courts have held that questions propounded in such a manner should be excluded.

The rule is clearly stated in *Wingfield v. McClintock, et al.*, (Kan.) 116 Pac. 488, at page 489, as follows:

> "Each party had a right to propound hypothetical questions upon his own theory of what the evidence tended to prove, *provided such questions contained no material exaggeration or perversion of facts assumed.* It is said in Commercial Travelers v. Barnes, 75 Kan. 720, 90 Pac. 293: 'Hypothetical questions put to expert witnesses should be based upon such facts only as the evidence tends to prove, and if, as to any material hypothesis, such question is without the support of evidence, it should be excluded. It may not be required that the question be based upon conceded facts, nor that it embrace all the facts of which there is evidence; neither is technical accuracy required in the framing of the question, *but no material exaggeration or perversion of facts assumed is permissible.*"

Certainly it was an exaggeration of the evidence when appellee's counsel stated in propounding the hypothetical questions that "she was struck a blow of sufficient force to cause her to sit down *violently* * * *" (Tr. 177), and, "she was *propelled violently* to the floor at the place she was standing." (Tr. 206)

The trial judge in allowing the questions to stand in the face of defendants' objections would give the jury the impression that he believed the evidence to be as stated in the questions.

IV

ASSIGNMENTS OF ERROR BASED UPON REFUSAL TO GIVE APPELLANTS' REQUESTED INSTRUCTIONS

ASSIGNMENT OF ERROR NO. 6

From the evidence of the witnesses for appellants it is clear that Jack Lampere was just standing at the time the plaintiff came up from behind and struck him full in the face. Under such evidence the appellants were entitled to an instruction setting out their rights under such conditions.

Request Number 3 did that very thing, but it, nor nothing like it, was given to the jury.

The request set out under Assignment Number 6 reads as follows:

> "The court instructs the jury that defendants' employee was the best judge of what was necessary to defend himself against the attack of plaintiff and of the means to be used for his own protection. When the defendants' employee was attacked he was obliged to exercise his best judgment at that time as to what he should do in his own defense and his judgment is one

which, if honestly and reasonably exercised, is controlling. It is absolutely controlling unless you find that his exercise of it at the time and under the circumstances, was such an exercise as was unreasonable under all the evidence in the case. So, if you find that from the nature of the assault committed upon defendants' employee by plaintiff he had a right to think he was being attacked by a person it was necessary for him to defend himself against, and in so acting his hand came in contact with plaintiff, without thought on his part that it might be a woman, then the plaintiff cannot recover in this action."

This request was approved as an instruction in the case of *Kent v. Cole* (Mich.) 48 N. W. 168, and is given as a pattern in 3 Reid's Branson Instructions to Juries 96.

ASSIGNMENT OF ERROR NO. 7

The appellants, on their theory of what happened when the appellee struck Jack Lampere, requested the court to instruct the jury as set out in Request No. 4. The court refused and did not cover the point invoked by any instruction given.

The request reads:

"You are instructed that the defendants' employee had a right to protect himself against an assault by plaintiff. If you find that plaintiff assaulted defendants' employee in such a manner and under such conditions as to naturally excite an ordinarily careful and prudent man in the place of said employee under the same circumstances and conditions, then the said employee cannot be held to the greatest nicety in the calculation of the amount of force which he should use; and even if he did use more force than was necessary, still if under the circumstances he acted as an ordinarily careful and

prudent man under the influence of plaintiff's conduct, as you find it to be, would have acted under the same circumstances and conditions, then you should find in favor of the defendants—'no cause of action.' "

That the law set out in this request is correct and that appellants were entitled to such instruction see

3 *Reid's Branson,* 98 and 99, under paragraph 8;
Swinney v. Wright (Ga.) 132 S. E. 228-9;

In the case of *Armuleuis v. Koblitz* (Ohio) 150 N. E. 620, the court said:

"The charge was not a model in wording, but, in substance, it was to the effect that, if the evidence showed, and the jury believed, that the plaintiff, Koblitz, came to the home of the defendant Joseph Armuleuis and while there caused a disturbance, and that the defendant Joseph Armuleuis repeatedly requested Koblitz to leave his home, and Koblitz repeatedly refused to go, and continued to conduct himself in the same disturbing manner, the defendant was justified in using such force as was necessary to eject the plaintiff from his house, and the law does not closely, nor nicely, measure the force which the defendant used to effect that purpose. This request to charge was refused. This constituted reversible error. Chesrown v. Bevier, 101 Ohio St. 282, 128 N. E. 94; Payne, Director General, v. Vance, 103 Ohio St. 59, 133 N. E. 85.

"The judgment must therefore be reversed."

ASSIGNMENT OF ERROR NO. 9

Appellants' third attempt to get the court to give some

instruction on their theory of this particular phase of the case is represented by its Request No. 6 reading:

> If you find from all the evidence that plaintiff struck defendants' employee when said employee was not expecting such an assault and said employee had reasonable grounds to believe and did believe that it was necessary to protect himself and in protecting himself he turned quickly and struck plaintiff but used no more force or violence than to him honestly and reasonably appeared necessary to repel a threatening injury, then under such circumstances the defendants' employee did no wrong and plaintiff has no right to recover damages in this case."

Certainly the foregoing request is closely tied in to the evidence and sufficiently states the law covering the facts in evidence.

The rule of law set out in headnote No. 2 of *Chesrown v. Bevier* (Ohio) 128 N. E. 94 clearly shows that error was committed by the court in not instructing on the phases of the case covered by the three requests last hereinabove set out. The statement in the case last above set out is this:

> "Upon a written request to charge before argument, if the request correctly states the law and is pertinent to one or more of the issues of the case and the same subject has not been covered by other charges given before argument, it is error to refuse to give such charge before argument, even though the language of the charge is not the exact language the court would have selected."

ASSIGNMENT OF ERROR NO. 8

The evidence is clear that the appellants were the owners

of and operated the giant racer. They therefore had the right to determine the manner in which the cars should be operated and had at the time in question, through their servants, elected not to operate the east side of the tracks or the green cars. Appellants' evidence shows that their employees had several times requested Bettilyon to leave the east platform and go over to the west side. (Tr. 234-5) If Bettilyon refused to leave the east platform after being requested to do so by appellants' employees, then he became a trespasser and the employees had the right to use such reasonable force as was necessary to remove him from the premises. Very substantial evidence shows that Mr. Bettilyon refused to leave the east platform. The evidence further shows that his attitude was one of resistance and that at the very first he was the aggressor and in spite of the effort of the appellants' employee he "swung" at him and the fight was on. (Tr. 80-81) The same attitude exhibited by Mr. Bettilyon was exhibited by Mr. Webb even after the entire affair was over. He says he went out to organize to go back for more. (Tr. 46)

If Bettilyon were a trespasser, or if he were the aggressor in the affray which ensued, then appellee in leaving a place of safety and interceding in the affray had no more rights or immunities than did Bettilyon, and appellants were entitled to have these propositions submitted to the jury as set forth in appellants' requested Instruction Number 5, which is assigned as Error Number 8. The requested Instruction reads as follows:

> "You are instructed that these defendants have the full right to determine the operation of the scenic racer and that they, through their servants, having determined not to operate the east set of tracks or green cars, then Bernard L. Bettilyon had no right to go on that side of the racer platform. You are further in-

structed that having gone on the east side if you find that his being there did in any way interfere with or cause trouble to defendants' servants in their operation of the racer that the servants of defendants had a lawful right to use such reasonable force as was necessary, after requesting Bernard L. Bettilyon to leave that part of defendants' property, to remove him from the place in question. You are also instructed that if in using force to remove said Bernard L. Bettilyon that he attempted to or did start to fight or hit the servant or servants of defendants and as a result of such assault or attempted assault the said Bernard L. Bettilyon was later injured, and that thereafter this plaintiff's husband voluntarily came into the fight and that later this plaintiff herself left a place of safety and slapped defendants' employee in the face, as a result of which plaintiff was struck by said employee, then plaintiff cannot recover in this case and your verdict will be for the defendants, and each of them, 'no cause of action.'" (Exception Tr. 251)

The requested instruction clearly states a theory of the case relied on by appellants and the trial court erred in refusing to give the instruction or a similar instruction that would present to the jury the appellants' defense.

In 6 *C. J. Sec. at pages* 815 *and* 816 the rule is stated as follows:

> *"A person interfering on another's behalf enjoys no further immunity than the person attacked. Hence, both must be free from fault in bringing on the difficulty,* the apparent danger must be such as to induce one exercising a reasonable and proper judgment to interfere to prevent a consummation of the injury, the force employed should not be more than appears to be reasonably necessary, the reasonableness thereof to be judged by the situation as it reasonably appeared to

defendant at the time of the assault. *When the danger is over, justification for the use of violence is at an end.* * * *

"Since, however, the person interfering on behalf of another enjoys no further or greater immunity than the person attacked, as stated supra in subdivision a of this section, defendant not only must be free from fault himself, but there must also be freedom from fault on the part of the person he seeks to protect. *Accordingly, if the person defended was not free from fault, his protector cannot claim immunity. Furthermore, before a person is justified in using force to protect members of his family, the apparent danger must be such as to induce one exercising a reasonable and proper judgment to interfere to prevent a consummation of the injury, and no more force must be used than is reasonably necessary for such purpose. If the danger has passed justification for the use of violence is at an end.*"

The same rule is clearly announced in the case of *Morris v. McClellan* (Ala.) 45 So. 641, at page 645, as follows:

"Where one, standing in the relation that authorizes him under the law to strike in the protection of another, is sued for an assault and battery for striking in protection of such other one, and undertakes to set up justification in defense of the action, there must not only be freedom from fault on the part of the person he sought to protect, but freedom from fault on his own part, as well as a necessity to commit the battery."

In *Roberson v. Stokes, et al* (N. C. 106 S.E. 151, action for assault and battery was brought by the plaintiff against W. G. Stokes and another. The verdict was against the plaintiff and from the judgment entered thereon plaintiff appealed. The appellate court in granting a new trial said and held:

"It was erroneous to charge the jury as set forth in the above statement of the case for two reasons: (1) *It was based upon the assumption that defendants' version of the assault was the correct one, whereas there was evidence that defendants were in the wrong throughout, and the jury therefore had the law stated to them with only a partial and contracted view of the evidence. This method of charging a jury has been disapproved by us. Where a phase of the evidence is presented to the jury, both contentions in regard to it should be given; otherwise it might cause the jury to give undue weight and significance to the one stated.* The very question was discussed in Jarrett v. Trunk Co., 144 N. C. 299, 56 S. E. 937, where it was said that, although it be not error generally to refrain from giving instructions unless asked to do so, yet care must be taken when the judge thinks proper to instruct the jury upon a phase of the evidence and to expound the law in relation thereto, not only to state it correctly, but to state the law as applicable to the respective contentions of each party upon such phase of the evidence. *Having undertaken to tell the jury how they should answer that issue if they found such facts according to plaintiff's contention, it was manifestly incumbent upon the court to state the defendants' contentions in respect to such phase of the evidence and to instruct the jury how to answer the issue should they sustain such contention.* State v. Austin, 79 N. C. 626; Burton v. Railroad, 84 N. C. 197; Bynum v. Bynum, 33 N. C. 636; State v. Wolf, 122 N. C. 1081, 29 S. E. 841.

"The phase mentioned by his honor was flatly denied by the plaintiff, and a very different complexion given to it by him. The judge's illustration, based, as it was, on the assumption that plaintiff was the sole aggressor, and that W. G. Stokes did nothing to bring on the fight, but was illegally assaulted by the plaintiff and knocked down, was not justified by the evidence, as

there was plenty of evidence to show that it was not true, but that the defendants were the aggressors, W. G. Stokes having attempted to attack the plaintiff with a brick, and that the latter acted in self-defense, and that the other defendant wrongfully and unlawfully joined in the attack upon him, having no just or legal ground for his intervention, which was simply voluntary and gratuitous on his part. It was therefore required, under the principle stated in Jarrett v. Trunk Co., supra, and the cases therein cited, that the judge should have stated both sides of the evidence bearing on that particular phase. Such an instruction was peculiarly required, under the circumstances of this case, and the incompleteness of the one given, in the respect indicated, may have turned the scales against the plaintiff, and probably did. What the judge did say afterwards was not sufficient to cure the error. * * * "

"The son could do only what his father could rightfully do, and must be judged by his rights and responsibilities, 'because,' as Hale said, 'they are in a mutual relation one to another.' The jury must find the facts, including the necessity of intervention by the son, and whether he kept within his privilege."

ASSIGNMENT OF ERROR NO. 10

Appellants' Assignment of Error Number 10 is that the court erred in refusing to give their requested Instruction Number 7, which reads as follows:

"You are instructed that Bernard L. Bettilyon had no right to be on the east or green car side of the platform in question without the consent of defendants. So, if you find that he, being on that side without right, refused to leave the east side of said platform when so requested by defendants' servants and that said servants

> then went to said Bernard L. Bettilyon at his dare and invitation to induce him to vacate the east side of said platform, and that as a result of the effort of defendants' servants to induce him to leave that part of defendants' premises the said Bernard L. Bettilyon, while said servants were in the exercise of only such reasonable force as was necessary to remove plaintiff, struck at defendants' servant and started to fight as a result of which he suffered some injury, then the plaintiff in this case cannot justify herself in leaving a place of safety and committing an assault upon the employee of these defendants and therefore plaintiff cannot recover in this case and your verdict must be for the defendants, and each of them, and against the plaintiff—'no cause of action.'" (Exception Tr. 251-252)

The request embodies substantially the same elements as appellants' Request Number 5 and could have been given in lieu of that instruction to present appellants' defense to the action. The refusal to give either of the requests or to cover the proposition contained therein by any other instruction is obviously reversible error.

ASSIGNMENT OF ERROR NO. 11

Appellants have assigned as error Number 11 the trial court's refusal to give their requested Instruction Number 8, which is as follows:

> "You are instructed that the lawful owner or occupant of premises may rightfully restrict the use of his premises to his business guests and this he may do by word of mouth a well as by erecting signs or barricades or by using other means of giving notice of the restricted use. If a business guest refuses to quit a

restricted portion of the owner's or occupant's premises after verbal request so to do, and reasonable opportunity has been given him to depart, he thereby becomes a trespasser and may be ejected by the use of such reasonable force as is necessary under the circumstances. So, in this case, if you find the acts of which the plaintiff complains arose out of the use of such force on the part of the employees of the defendants or an exercise on their part of the right to defend themselves against attack by Mr. Bettilyon, then plaintiff cannot recover in this action." (Exception Tr. 252)

The principle of law relied on by appellants in this requested instruction is clearly stated in 6 *C. J. Sec. at pages* 819 *and* 820, as follows:

"Reasonable force may be used to prevent a trespass on one's property or to eject a trespasser or intruder thereon.

"A lawful owner or occupant of premises, or one claiming title and rightfully in possession, may retain possession and use such force as may be reasonably necessary to prevent an unlawful entry, or to remove trespassers or intruders, or persons, originally on the premises by license or permission, who refuse to leave on request, and are given a reasonable time in which to do so, * * * ."

In *Johnson v. Huntsman,* 60 Utah, 402; 209 Pac. 197, at page 201, the Supreme Court of Utah cites with approval the rule stated in 2 R. C. L. at page 559, as follows:

"It is a well-settled principle that the occupant of any house, store, or other building has the legal right to control it, and to admit whom he pleases to enter

and remain there, and that he also has the right to expel from the room or building any one who abuses the privilege which has been thus given him. Therefore, while the entry by one person on the premises of another may be lawful, by reason of express or implied invitation to enter, *his failure to depart, on the request of the owner will make him a trespasser, and justify the owner in using reasonable force to eject him.*"

ASSIGNMENT OF ERROR NO. 12

As previously pointed out in this brief it is appellants' theory, sustained by their evidence, that at least two times after the fracas started that it came to an end, and was then started again either by appellee's brother Lou or by herself without any real cause.

There is no question but what Bernard Lynch (Slim) came into the affray. All the witnesses saw him there, although appellee's witnesses do not ascribe to him his doing what he and appellants' witnesses said that he did in trying to end the affair. His testimony as to what he saw and did in connection with the affair is as follows:

That the first time he saw Earl Cochran and Mr. Bettilyon, Earl was standing in the pit motioning for Mr. Bettilyon to go out. At that time Bernard was going out of the aisle that the unloaded passengers from the west side of the cars followed to get out. The next time he saw Earl he was on the platform with Mr. Bettilyon, trying to push him toward the front. (Tr. 224) They started scuffling and fighting there and

"I saw Mr. Webb coming down the same side toward them and so I climbed over the fence at about

point 'D' and went around on that side to see where they were. At that time Earl, Mr. Bettilyon, Mr. Webb and Jack were there together. I took hold of Mr. Bettilyon's arm from the back and tried to turn him around and take him out. I said if they wanted him to get out of there he had better get out. I tried to take him down toward the opening marked 'P.' I took him a few feet and he wrenched loose from me and went back in to where they were scuffling. (Tr. 225) When he wrenched loose from me and went back in there I started towards him and just then Mr. Lampere hit him and he fell down on the floor. During the time I was holding him there was no one right around us then. They were down quite a few feet further than that." (Tr. 226)

With this evidence, which was also the evidence of appellants' other witnesses, before the court, we submitted to the court our request Number 9 reading as follows:

"You are instructed that if you find from the evidence that when Bernard Lynch went into the trouble going on at the place in question here the altercation was brought to a stop by his taking hold of Mr. Bettilyon and attempting to get him away from the trouble and that Mr. Bettilyon then broke away from him and charged at Jack Lampere, who at that time in self-defense struck Mr. Bettilyon, that then Mr. Bettilyon was the aggressor; and if you further find that Mr. Webb was still in the altercation along with Mr. Bettilyon then I instruct you that plaintiff had no right to leave a place of safety, go up to Mr. Lampere and strike him, and that she cannot recover in this action against these defendants." (Exception Tr. 252)

The court refused to give said request and in his instruc-

tions as given to the jury did not cover the point in any way. That appellants were entitled to such an instruction is sustained by the following cases:

3 *Reid's Branson Inst.* 106 *Sec.* 753.

In *Miller v. Trascher* (La.) 145 So. 27, young Miller threw a rock and struck defendant's son, then went over and sat down. Trascher senior struck young Miller. The latter through his parents sued Trascher. The court in sustaining judgment for Miller says that no further attack by Miller seemed evident therefore the blow by Trascher was not justified.

Clearly here the evidence shows that if Lou Bettilyon had followed out "Slim's" directions there would have been no further action, and no excuse for appellee striking Jack as she did. Appellants were entitled to have this issue submitted to the jury.

ASSIGNMENT OF ERROR NO. 15

The assignment states that the court erred in failing and refusing to instruct on appellants' theory of their defense. We have pointed out above the requests made of the court for instructions on appellants' defenses, all of which were refused.

Now we will consider the instructions given by the court. Instructions Nos. 1 and 2 (Tr. 39-40) cover the pleadings. Instruction No. 3 (appellee's request) (Tr. 4) defines abstractly assault and battery. Instruction No. 4 (appellee's request) (Tr. 42) says plaintiff was a guest at Saltair for the entire evening. Instruction No. 5 (appellee's request) (Tr. 43) says if appellee was apprehensive of bodily harm to husband

or brother she was justified in entering the affray, and if rendered unconscious her participation would not prevent recovery.

Instruction No. 6 (Tr. 44) says one may protect members of his or her family provided danger appears.

Instruction No. 7 (appellee's request) (Tr. 45) instructs as to pregnancy and miscarriage.

Instruction No. 8 (appellants' request) (Tr. 46) instructs that only three of the appellants' employees were mixed up in the affray.

Instruction No. 9 (appellants' request) (Tr. 47) is repetitious of No. 6, setting out conditions under which appellee was justified in entering combat.

Instructions No. 10 and 11, (Tr. 47-48) are as to damages and the balance of the instructions (Tr. 49) are the regular form instructions usually given by the court.

In all our experience in trial work over 30 years we have never had a case where the court has so absolutely failed to instruct on the issues involved. The case to begin with was complicated and in order to afford the appellants any consideration by the jury the defenses of the appellants as established by evidence should have been called to the attention of the jury. For the court to have so completely failed to give place to appellants' defenses and theories requires without question a reversal of the judgment entered in this case.

In *Pratt v. Utah Light & Traction Co.*, 57 Utah 7, 169 Pac. 868, the court said:

> "Each party to a suit is entitled to have his theory, when there is evidence to sustain it, submitted to the jury and the judgment of the jury on the facts tending to support such theory, assuming always that there is testimony offered to support the same, and this court

has so held in Hartley v. Salt Lake City, 41 Utah, 121, 124 Pac. 522, where, speaking through Straup, J., it is said:

> " 'There are two parties to a lawsuit. Each, on a submission of the case to the jury, is entitled to a submission of it on his theory and the law in respect thereof. The defendant's theory as to the cause of the accident is embodied in the proposed requests. There is some evidence, as we have shown, to render them applicable to the case. That is not disputed. We think the court's refusal to charge substantially as requested was error. That the ruling was prejudicial and works a reversal of the judgment is self-evident and unavoidable.' "

This rule is restated and approved in *Morgan v. Bingham Stage Lines Co.* et al, 75 Ut. 87, 283 Pac. 160.

V.

ERRORS BASED UPON INSTRUCTIONS GIVEN TO JURY

The next series of Assignments go to the errors made by the court in the instructions which he gave to the jury.

ASSIGNMENT OF ERROR NO. 16

There is no question in the evidence that the appellee and party paid their way into Saltair, nor is there any conflict about Saltair and the Racer being under separate ownership and operation. It appears affirmatively in the record that for one to ride the racer he must pay a fee in addition to the entrance

fee to Saltair. Now in the face of such a record the court gave as its instruction No. 4 appellee's request, reading:

> "The court instructs you, if you find from the evidence that the plaintiff's admission to Saltair Beach was paid, that she was a guest and had a right to remain there as long as said resort remained open to the public that evening." (Exception Tr. 246)

Clearly the evidence did not warrant such an instruction. The jury, to give the court any credit for trying to say something relevant to the issues involved, must have understood the court to say that the appellee and her party having paid their way into Saltair were guests for the night on the Racer regardless of what happened or their actions in and about the Racer. Such an instruction is most dangerous and gave the jury excuse for speculation on points that are not involved in the case at all. In this case there can be little doubt but that it worked to the prejudice of the appellants.

This court in *State Bank of Beaver County v. Hollingshead,* 82 Utah 416, 22 Pac. (2d) 612, in setting out what an instruction should present said:

> "It is necessary, however, that whatever theories are presented by pleadings or otherwise, in order to be entitled to be submitted by way of instructions to the jury, some evidence must have been received by the court in support of such theory. Instructions to a jury must be responsive to the issues and of such nature that they are applicable to the evidence received and submitted to the jury. * * *
>
> "It is the duty of the court to instruct the jury as to the law applicable to the evidence of the particular case, having reference to the parties thereto."

ASSIGNMENT OF ERROR NOS. 17 AND 18

On the appellee's theory, that she had a right to leave a place of safety and step out when all things were at rest, and say to Jack Lampere, "You can't do that," and strike him full in the face, and recover from appellants damages because he in some way struck her, the court gave the appellee's request as instruction No. 5 which read:

> "The court instructs you if you find from the evidence that the plaintiff was apprehensive that her husband and brother, or either of them, were in danger of bodily harm, and that she interceded in the affray in order to try to protect either or both of them, that she was justified in doing so. If you further find from the evidence that as a result of her participation in the affray she was rendered unconscious by a blow from one of the defendants' employees, the mere fact that she participated in the affray would not bar her from recovering damages from the defendants." (Exception Tr. 246)

We excepted to the instruction as a whole and then broke it down into two parts and excepted to each part. Our exceptions are covered by the two assignments set out above.

Dividing the instruction into two parts, what does it say?

1. The jury is told that if they "find from the evidence that the plaintiff was apprehensive that her husband and brother or either of them were in danger of bodily harm, and that she interceded in the affray in order to try to protect either or both of them, that she was justified."

The one big defect in this instruction is that it assumes that appellee's husband and brother were being unlawfully assaulted

and that therefore the only question is as to her apprehension concerning them. The evidence in this case goes both ways if appellee's evidence is interpreted in her favor. Under appellants' evidence her relatives were the aggressors and under the law she could be in no better position than they. *Morris v. McClellan, supra.* For the court to leave out a submission of the issue on all the evidence and to have made the assumption which is made is prejudicial and constitutes reversible error.

2. The jury is told that if they find from the evidence "that as a result of her participation in the affray she was rendered unconscious by a blow from one of the defendants' employees, the mere fact that she participated in the affray would not bar her from recovering damages."

Here again is the basic assumption that appellee's relatives were rightfully in the affray, and consequently that she was in the same position. The appellants' position in the case was entirely forgotten and was never in any instruction submitted to the jury. Our evidence established appellee as the aggressor, and that theory should have gone to the jury. 6 *Corpus Juris Sec. supra.*

ASSIGNMENT OF ERROR NO. 19

Instruction No. 6 reads as follows:

> "A person is justified in using sufficient force to protect members of his or her family, provided the apparent danger is such as to induce one exercising a reasonable and proper judgment to interfere to prevent a consummation of the injury." (Tr. 246)

Here again the jury is told, without limitation that, applying the instruction to the appellee, regardless of the right or

wrong of her relatives or herself she had a right to interfere in the altercation in question. Certain it is, with all the emphasis on this point the jury was thoroughly mislead as to the respective rights of the parties in this case. In no other way can the result obtained here be accounted for. The verdict was most excessive.

ASSIGNMENTS OF ERROR NOS. 20 AND 21

Here our exceptions go to Instruction No. 7 as a whole and to its two separate parts. Taken as a whole we find this is what the jury was told:

> "The court instructs you that if you believe from the evidence, that the plaintiff was pregnant at the time she was rendered unconscious by the blow delivered by one of the defendants' employees.
>
> "And as a result of said blow and being knocked to the floor she suffered a miscarriage and thereby the loss of her unborn child you may award her money damages for the loss of said unborn child."

And as we read the instruction and as it would most probably be understood by the jury the court instructed the jury:

If you believe from the evidence that appellee was pregnant (when) *at the time she was rendered unconscious by "the blow" delivered by one of the defendants' employees, and as a result of said blow and being knocked to the floor she suffered* (what) a miscarriage and thereby the loss of her unborn child, then she can recover her damage for the "loss of *said* unborn child."

In other words, the court, without reference to the disputed facts in evidence, has peremptorily instructed the jury as to the actcual existence of four sets of facts which are shown by the evidence to be in great dispute. They are:

1. That she was rendered unconscious,
2. By *"the blow"* delivered by one of the defendants' employees,
3. That as a result of *said blow,* and
4. Being knocked to the floor.

The very sequence of the facts as to which the court instructed the jury are so closely tied up to the appellee's contention that the jury could not help but believe that the court meant to tell them that those were all the facts that had any bearing on the issues.

Certainly such instruction was gross error on the part of the court and exceedingly unfair to the appellants.

The nature of this case being predicated upon alleged assault and battery is very like a criminal case wherein the personal element is particularly present and the minds of the jury are likely to be inflamed as a result of anything that is said indicating that there was malice or viciousness in what was done. For this reason the rule laid down by this court in *State v. Seymour,* 49 Utah 285, 163 Pac. 789, is particularly in point. In that case the court says:

> "The charge is, however, faulty for another reason. The court, in that portion of the charge we have copied above, assumed a very material fact to exist as appears from the words we have italicized.
>
> "The same vice, while not so pronounced, is also found in other portions of the charge, to which it will, however, not be necessary to refer, for the reason that the error will not occur again.

"Courts, in charging jurors, should be very careful not to assume any material fact or facts. Jurors, who are laymen, are always eager to follow the opinion or judgment of the court, and if the court assumes any material fact in the charge, the jurors are most likely to follow the assumptions of the court. Indeed, we must assume that such is the case unless the record clearly shows the contrary."

This court again reaffirms this doctrine in *State v. Hannah,* 81 Utah 580, 21 Pac. (2d) 537, page 540:

"The jury to assume as proven any material controverted fact is held by this court in State v. Seymour, 49 Utah, 285, 163 P. 789, 792, where the court, speaking through Chief Justice Frick, says: 'Courts, in charging jurors, should be very careful not to assume any material fact or facts. Jurors, who are laymen, are always eager to follow the opinion or judgment of the court, and if the court assumed any material fact in the charge, the jurors are most likely to follow the assumptions of the court. Indeed, we must assume that such is the case unless the record clearly shows the contrary.'

"So thoroughly established is this principle that it seems almost superfluous to cite authorities. When the instruction without qualification assumed that the offense had been committed, it thereby relieved the jury of the necessity of weighing the evidence and determining for itself that question."

It was also error for the court to tell the jury that if they believed she was pregnant and as a result of the blow suffered a miscarriage the jury may award her money damages for the loss of said unborn child. Such is not the law as is established

by the cases cited below and argued under the next succeeding assignments covering the instruction on damages.

See *Wallace v. Portland Ry. L. P. Co.*
(Or) 170 Pac. 283
Vitale v. Biando (Mo.) 52 S. W.
(2d) 24

VI.

ERRORS IN INSTRUCTION AS TO DAMAGES

ASSIGNMENTS OF ERROR NOS. 22 AND 23

In instruction No. 7 considered next above, the court in the last half of the instruction twice emphasized the "unborn child" idea and now in this instruction tells the jury she may recover "for the loss of her unborn child" when in fact the only evidence she personally gave of such a being was that she had missed her regular menstrual period some two weeks before the trouble.

The instruction reads as follows:

> "The court instructs you, members of the jury, that if you find the issues in this case in favor of plaintiff and against the defendants, you may find for the plaintiff such a sum as will compensate her for the following damages, not to exceed $5,000.00:
>
> "1. The actual personal injuries which she suffered;
>
> "2. The consequent pain and suffering which she suffered as a result of her physical injuries;
>
> "3. Money damages for the loss of her unborn child as a result of said miscarriage.

> "In addition to the amount named above, you may also assess such damages as will compensate for the loss or injury to her clothing, not to exceed the sum of $75.00." (Tr. 247-248)

We took one exception to the instruction as a whole and then exceptions to each separate paragraph of the instruction. (Tr. 254-5)

It is our position that paragraph three stating that appellee can recover "money damages for the loss of her unborn child" is bad in and of itself and that it renders the entire instruction bad because read along with the other parts of the instruction it leads the jury to award damages taking all elements together, which is not warranted under any theory.

The allegations or prayer of appellee's amended complaint do not set out any basis for the giving of such an instruction nor is there any evidence of loss of companionship or value of lost services to support the same. In addition such an element of damage is fundamentally too remote.

That the instruction and that particular part specifically excepted to is bad and not the law is forcibly set out by the Supreme Court of Oregon in *Wallace v. Portland, Ry. L. P. Co., supra,* where the court said:

> "Considering the first assignment of error, the theory of the plaintiff advanced in support of the testimony concerning the sex of the child and the state of advancement of the fetal life was that it was 'material to the mother with regard to loss of service.' This was referable to the allegation of the complaint about the loss of the child and the predication of damages thereon. No question is made, and there can be none, but that a plaintiff, a pregnant woman, may recover for the pain and injury, both physical and mental, experienced

by her from a miscarriage brought about by the negligent act of a defendant. She is entitled to have nature in such cases work out its proper function in due time. Any disturbance of the period or process of gestation resulting in her injury is actionable. *It is only, however, for the injury to her that she can recover. She has no action for the loss of the child.* The injury, if any, is too remote and speculative to form a basis for damages. The principle is succinctly stated in the closing paragraph of a note to Tunnicliffe v. Bay Cities R. R. Co., 23 L.R.A. 142, thus:

" 'The review of the decisions shows that they are in almost entire harmony in holding that miscarriage may be one of the effects of wrong for which recovery may be had. They also show that the effect on the mother alone is to be considered, and recovery for miscarriage allowed only so far as it is part of her personal injuries, not including any recompense for loss of anticipated offspring.' " (citing cases).

The same rule is laid down in *Vitale v. Biando* (*Mo.*) *supra*. There the court stated:

"In this state of the record we have in mind that the physical injuries suffered by a female through negligence of another, occasioning a miscarriage, will operate as a cause of action in her favor to the extent that she may be injured thereby in the impairment of health and increased suffering of body and mind, occasioned by the miscarriage, over and beyond that which usually attends a birth in due course, *but the loss of the offspring itself is not to be considered as an injury to her,* for the reason that the basis of a recovery on the part of a parent for the death of a child by the negligence of another is the value of the services of the child to the parent during minority, and therefore, a recovery for

the loss of a prospective offspring, it is said, would extend the field of damage into the realm of mere possibility. 'Of course, the loss of the anticipated society of the prospective child and mere matters of sentiment which attend such misfortunes are too remote for consideration by the courts as a basis for monetary compensation, though the law be humane, in its policy and purpose.' Finer v. Nichols, 158 Mo. App. 539, 138 S. W. 889, 892, and cases cited therein."

VII.

THE JUDGMENT IS EXCESSIVE AND IS NOT SUSTAINED BY LAW

ASSIGNMENT OF ERROR NO. 24

From the points discussed in this brief so far it seems to us there can be no question but that the court erred in receiving the verdict and entering judgment thereon, because it is established that the verdict is excessive and against the law.

The event in issue here happened on June 22, 1940. The appellee filed her complaint on September 6, 1940, and in that complaint did not allege one fact to the effect that she was pregnant or that she had had a miscarriage. In fact she alleged an entirely different set of facts than those alleged in her amended complaint as a basis for her recovery. (Tr. 1-2-13A-13C and D).

By her own testimony she never went to see a doctor until long after the complaint was filed. It was late in October, 1940, when she went to see Dr. Giesy. Then nothing was said to appellants about a claimed miscarriage until the 11th of December, 1940, when the parties were about to go to trial, at which time, she filed an amendment to her complaint.

As pointed out in the next preceding assignment the basis given by the court upon which the jury was allowed to determine the damages in this case has no support in the law. Therefore it follows that the verdict must be excessive and the judgment against the law. It is impossible for the court to apportion the verdict to the different elements of damage set out by the court in its instruction.

VIII.

COURT ERRED IN DENYING MOTION FOR NEW TRIAL

ASSIGNMENT OF ERROR NO. 25

The appellants within time, after entry of judgment in this case, filed their motion for a new trial which was argued to the court. He denied the motion.

The grounds upon which we contend the court erred in taking such action are fully argued in this brief and consequently there is no need to restate them here. It is our position that the trial court should, based upon the errors committed in the trial of the case, have granted appellants a new trial.

In conclusion for the reasons stated in this brief appellants pray this court that it reverse the judgment entered in this case and remand said case for a new trial.

Respectfully submitted,

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